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Supreme Court of the United States

ROBERT DURALL,
Petitioner,
v.
KENNETH QUINN,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case presents the question that this Court intended to resolve but was unable to reach in *Burton v. Stewart*, 549 U.S. 147 (2007) (per curiam): whether this Court's decision in *Blakely v. Washington*, 542 U.S. 296 (2004), announced a "new rule" of constitutional law and, if so, whether it applies retroactively on collateral review.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Robert Durall respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. 1a) is unpublished but is available at 2009 WL 118966. The district court's order denying relief (Pet. App. 4a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on January 13, 2009. Pet. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

Based on factual findings it made by a preponderance of the evidence, a trial court in Washington State gave petitioner Robert Durall an “exceptional sentence” – adding over twenty years to the sentence than would have been allowed by his jury verdict alone. Before petitioner’s sentence became final, this Court held in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), that the Sixth and Fourteenth Amendments prohibit courts from imposing sentences above the “statutory maximum” permitted by “the jury verdict alone” by making their own findings. *Id.* at 483, 490. Such facts must be proven to a jury beyond a reasonable doubt. *Id.* at 490. And six weeks after petitioner’s conviction and sentence became final on direct review, this Court confirmed in *Blakely v. Washington*, 542 U.S. 296 (2004), that *Apprendi* applied specifically to Washington’s system for imposing exceptional sentences. Still unable to obtain any relief through state post-conviction proceedings, petitioner now seeks federal habeas relief. The issue here is whether *Blakely* announced a “new rule” under the doctrine of *Teague v. Lane*, 489 U.S. 288 (1989), and, if so, whether it applies retroactively on collateral review.

1. Petitioner was convicted in 2000 of first degree murder in the death of his wife. The State proved that the crime was achieved by means of poisoning. Based on the elements of that crime alone, petitioner faced a sentencing range under the Washington determinate sentencing system of between 240 and 320 months. *State v. Durall*, No. 47928-8-I, 2003 WL

21000996, at *1 (Wash. Ct. App. May 5, 2003). The trial court, however, imposed an “exceptional sentence” of 560 months. The trial court based this sentence on its finding four “aggravating factors” by a preponderance of the evidence: “[1] egregious and culpable mental state based upon planning and research, [2] egregious lack of remorse, [3] vulnerability and abuse of trust, and [4] domestic violence.” *Id.*

The Washington Court of Appeals affirmed petitioner’s conviction and sentence, holding that “at least three of the four” aggravating factors were “valid and supported by the evidence.” *Id.* (The court declined to address whether the trial court’s findings were sufficient to support the vulnerability factor. *Id.*) On February 4, 2004, the Washington Supreme Court denied review. *State v. Durall*, 84 P.3d 1230 (Wash. 2004). Petitioner did not seek certiorari from that decision, so his conviction became final on direct review on May 4, 2004.

2. Six weeks later, this Court held in *Blakely v. Washington*, 542 U.S. 296 (2004), that facts supporting exceptional sentences in Washington were subject to the Sixth Amendment’s requirement that they be proven to a jury beyond a reasonable doubt. Accordingly, petitioner filed a “personal restraint petition” in the Washington Court of Appeals (the method for seeking state habeas relief), asserting in part that his sentence violated the Sixth Amendment.

The Washington Court of Appeals dismissed the petition on the ground that it failed to raise a non-frivolous claim. As is relevant here, the appellate court held that petitioner’s Sixth Amendment claim lacked merit because it depended on *Blakely*, which

was decided after petitioner's conviction became final "and is not applied retroactively." *In re PRP of Durall*, No. 55629-1-I, at 16-17 (Dec. 22, 2005).

Petitioner appealed to the Washington Supreme Court, which denied review. The Supreme Court Commissioner reasoned that petitioner's sentence "was lawful" under the Sixth Amendment "when his judgment became final." Pet. App. 24a. The Court further ruled that "*Blakely* does not apply to [petitioner's] case" because it does not apply retroactively. Pet App. 24a (citing *State v. Evans*, 114 P.3d 627 (Wash. 2005), *cert. denied*, 546 U.S. 983 (2005)). Petitioner filed a "motion to modify" that ruling – the equivalent of a motion to reconsider it – but the Washington Supreme Court denied that request without comment. *In re PRP of Durall*, No. 78212-1 (Mar. 3, 2006).

3. Petitioner next sought federal habeas relief under 28 U.S.C. § 2254 in the U.S. District Court for the Western District of Washington, arguing among other things that his exceptional sentence violates his right under the Sixth Amendment. A magistrate judge recommended that the district court deny the petition, and the district court agreed. The district court explained that it was bound to follow the Ninth Circuit's decision in *Schardt v. Payne*, 414 F.3d 1025, 1038 (9th Cir. 2005), holding that *Blakely* announced a new rule that could not be applied retroactively on collateral review. Pet. App. 15a.

The district court, however, granted petitioner a certificate of appealability on this issue. The district court cited this Court's grant of certiorari in *Burton v. Stewart*, 549 U.S. 147 (2007) (per curiam), as evidence that "it is debatable whether *Blakely*

announced a new rule, and whether it applies retroactively.” Order Granting in Part and Denying in Part Motion for COA, at 5 (Sept. 7, 2007).

4. The Ninth Circuit affirmed, noting that petitioner’s Sixth Amendment argument “is foreclosed by *Schardt v. Payne*.” Pet. App. 3a.

REASONS FOR GRANTING THE WRIT

Under the retroactivity framework established in *Teague v. Lane*, 489 U.S. 288 (1989), a state prisoner seeking federal habeas corpus relief may rely on a case from this Court that was decided after his conviction became final only if (1) the decision did not announce a “new rule,” but rather merely applied a pre-existing rule of criminal procedure; or (2) the decision constitutes a “watershed” rule of criminal procedure and, therefore, applies retroactively.

This Court granted certiorari in *Burton v. Stewart*, 549 U.S. 147 (2007) (per curiam), to resolve whether the decision in *Blakely v. Washington*, 542 U.S. 296 (2004), announced a “new rule” of criminal procedure, and, if so, whether it applies retroactively. Due to an unforeseen procedural complication (the fact that Burton’s habeas petition turned out to be his second one, thereby depriving this Court of jurisdiction), this Court was unable to address those issues.

This case is an ideal vehicle to finally resolve the question presented in *Burton*, and this Court should take the opportunity to do so. The *Blakely* decision upended sentencing systems in fifteen states, and many inmates sentenced pursuant to these unconstitutional regimes remain incarcerated, still litigating their initial petitions for federal habeas

relief. Furthermore, the Ninth Circuit's current stance – namely, that *Blakely* announced a new rule that is not retroactive – is wrong. *Blakely* did not break any new ground in applying prior Sixth Amendment precedent to exceptional sentences imposed under Washington's sentencing system. And even if it had, that rule would have to be retroactive because of its centrality to the determination of guilt or innocence.

I. The Question Of Whether *Blakely* Announced A New Rule And, If So, Whether It Applies Retroactively Continues To Be A Pressing Issue.

This Court's decisions in *Blakely v. Washington*, 542 U.S. 296 (2004), *Ring v. Arizona*, 536 U.S. 584 (2002), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), upended the noncapital sentencing systems in fifteen states: Alaska, *Milligrock v. State*, 118 P.3d 11 (Alaska Ct. App. 2005); Arizona, *State v. Brown*, 99 P.3d 15 (Ariz. 2004); California, *Cunningham v. California*, 549 U.S. 270 (2007); Colorado, *Lopez v. People*, 113 P.3d 713 (Colo. 2005); Hawaii, *State v. Maugaotega*, 168 P.3d 562 (Haw. 2007); Indiana, *Smylie v. State*, 823 N.E.2d 679 (Ind. 2005); Maine, *State v. Schofield*, 895 A.2d 927 (Me. 2005); Minnesota, *State v. Shattuck*, 704 N.W.2d 131 (Minn. 2005); New Jersey, *State v. Natale*, 878 A.2d 724 (N.J. 2005); New Mexico, *State v. Frawley*, 172 P.3d 144 (N.M. 2007); North Carolina, *State v. Allen*, 615 S.E.2d 256 (N.C. 2005); Ohio, *State v. Foster*, 845 N.E.2d 470 (Ohio 2006); Oregon, *State v. Dilts*, 103 P.3d 95 (Or. 2004); Tennessee, *State v. Gomez*, 239 S.W.3d 733 (Tenn. 2007); and Washington. See

generally Don Stemen & Daniel F. Wilhelm, *Finding the Jury: State Legislative Responses to Blakely v. Washington*, 18 FED. SENT'G REP. 7, 10 (2005) (listing all states except Hawaii and Maine); JON WOOL & DON STEMEN, AGGRAVATED SENTENCING: *BLAKELY V. WASHINGTON*: PRACTICAL IMPLICATIONS FOR STATE SENTENCING SYSTEMS 3 (Vera Inst. of Justice State Sentencing & Corrections Policy & Practice Review, 2004) (same).

During the years leading up to *Blakely*, each of these fifteen jurisdictions sentenced thousands – in some cases, tens of thousands – of felony offenders each year. Although rates of aggravated sentences varied in these states, somewhere between three and twenty percent of offenders under these sentencing systems received aggravated sentences.¹ That means that during the four years between *Apprendi* and *Blakely* alone, tens of thousands of offenders received

¹ See, e.g., *People v. Black*, 113 P.3d 534, 546 n.14 (Cal. 2005) (between thirteen and seventeen percent); *State v. Shattuck*, 704 N.W.2d 131, 146 n.15 (Minn. 2005) (7.3 percent); ALASKA JUDICIAL COUNCIL, ALASKA FELONY PROCESS: 1999, at 81 fig. 8 (2004), available at <http://www.ajc.state.ak.us/reports/Final%20Version%20of%20Report9.pdf> (twenty percent); STATE OF OR. CRIMINAL JUSTICE COMM'N, SENTENCING PRACTICES: SUMMARY STATISTICS FOR FELONY OFFENDERS SENTENCED IN 2001, at 13 (2003), available at <http://www.oregon.gov/CJC/SG01v2.pdf> (eleven percent); WASH. SENTENCING GUIDELINES COMM'N, STATISTICAL SUMMARY OF ADULT FELONY SENTENCING – FISCAL YEAR 2003, at 21 (2004), available at http://www.sgc.wa.gov/PUBS/Statistical_Summaries/FY2003_Statistical_Summary.pdf (three percent); Ronald F. Wright, *Blakely and the Centralizers in North Carolina*, 18 FED. SENT'G REP. 19, 22 n.4 (2005) (seven percent).

aggravated sentences. The number only gets bigger as one looks farther back time. Although some of those sentences were undoubtedly constitutionally imposed – either because they were based on prior convictions or because defendants agreed in plea bargains to the enhanced sentences – it is safe to assume that the vast majority depended on factual findings beyond the crimes of conviction and thus violated the Sixth Amendment.

State prisoners continue to challenge these aggravated sentences in habeas proceedings. As was the case when this Court granted certiorari in *Burton*, most lower courts hold that *Blakely* announced a new rule – at least, as is explained below, when it suits them. All courts hold that *Blakely* is not retroactive because it did not announce a watershed rule of criminal procedure. Nonetheless, the claims keep coming.

A. Federal Courts Of Appeals And State High Courts Have Issued Inconsistent Decisions Concerning Whether *Blakely* Announced A New Rule.

To the extent the situation in the lower courts has changed since this Court granted certiorari in *Burton* in June of 2006, it has grown less stable and more in need of this Court's intervention.

1. Prior to this Court's grant of certiorari in *Burton*, the Ninth Circuit held in a case involving a Washington State prisoner that *Blakely* announced a "new rule" of criminal procedure. See *Schardt v.*

Payne, 414 F.3d 1025, 1035 (9th Cir. 2005) (Washington sentencing system).² Around the same time, the Tenth Circuit held likewise in a case involving a Colorado prisoner. *Allen v. Reed*, 427 F.3d 767, 775 (10th Cir. 2005), *cert. denied*, 549 U.S. 1165 (2007).³ And while *Burton* was pending in this Court, the Eighth Circuit reached the same conclusion in at least one unpublished decision concerning a Minnesota prisoner. *See Jackson v. Dingle*, No. Civ. 04-19, 2005 WL 1270594 (D. Minn. May 25, 2005), *aff'd without opinion* (8th Cir. Feb. 24, 2006), *cert. denied*, 549 U.S. 1168 (2007).⁴

Oddly enough, the Ninth Circuit held after certiorari was granted in *Burton* that prisoners in Arizona and Hawaii whose aggravated sentences

² Schardt, proceeding pro se, filed a petition for certiorari from the Ninth Circuit's decision. *See Schardt v. Payne* (No. 05-9237). This Court found him ineligible to proceed in forma pauperis and ordered him to file his petition in printed form. Schardt apparently never did so. The case remains on this Court's online docket, with review having never been denied.

³ This Court held *Allen* while *Burton* was pending, but it was not a suitable vehicle to resolve the question presented because Allen's enhanced sentence rested in part on prior convictions. *See Br. in Opp. 5-17, Allen v. Reed*, 549 U.S. 1165 (2007) (No. 05-9740).

⁴ This Court held *Allen* while *Burton* was pending, but it was not a suitable vehicle to resolve the question presented because the facts petitioner claimed should have been proven beyond a reasonable doubt related to "other acts" evidence necessary to prove petitioner's identity; they were not aggravating facts that exposed him to heightened punishment. *See Br. in Opp. 3-7, Jackson v. Dingle*, 549 U.S. 1168 (2007) (No. 06-5451).

became final between 2000 and 2004 *are* entitled to habeas relief on the basis of *Apprendi*. See *Stokes v. Schriro*, 465 F.3d 397 (9th Cir. 2006) (Arizona); *Kaua v. Frank*, 436 F.3d 1057 (9th Cir. 2006) (Hawaii). The Ninth Circuit apparently did not realize in either case that the question whether *Blakely* announced a new rule is really the same question as whether state prisoners whose sentencing systems were ruled invalid in light of *Blakely* may obtain habeas relief on the basis of *Apprendi* alone. Yet despite several requests that the Ninth Circuit take a case en banc to resolve this inconsistency,⁵ the court of appeals has refused to do so.

Among states that have chosen to follow the *Teague* retroactivity rules, see *Danforth v. Minnesota*, 128 S. Ct. 1029, 1045 (2008), state high courts uniformly hold *Blakely* established a new rule. See *State v. Smart*, ___ P.3d ___, 2009 WL 484429, at *6 (Alaska Feb. 27, 2009); *People v. Johnson*, 142 P.3d 722, 724 (Colo. 2006); *State v. Houston*, 702 N.W.2d 268, 273 (Minn. 2005); *State v. Evans*, 114 P.3d 627, 632-33 (Wash. 2005); *People v. Amos*, 22 Cal. Rptr.3d 908, 914-917 (Ct. App. 2005).

At the same time, two states that follow a different system of retroactivity – allowing prisoners to bring second or otherwise untimely claims

⁵ See, e.g., Petr's C.A. Br. 33-55 (unsuccessfully urging court to overrule *Schardt*); Br. for Appellant at 10-13, *Nielsen v. Miller-Stout*, 296 Fed. App'x 552 (9th Cir. 2008) (No. 07-35872), available at 2007 WL 4692929 (unsuccessfully arguing that court should resolve inconsistency between *Schardt*, *Stokes*, and *Kaua*).

whenever this Court announces a “new rule” of constitutional law – have held that *Blakely* did *not* announce a new rule, “but merely applied the existing law established in *Apprendi v. New Jersey*.” *State v. Barber*, No. 21837, 2007 WL 3071891, at *2 (Ohio App. Ct. Oct. 19, 2007); *accord Gomez v. State*, 163 S.W.3d 632 (Tenn. 2005) (“*Blakely* did not announce a new rule”), *vacated on other grounds*, 549 U.S. 1190 (2007); *Zonge v. State*, No. W2008-01930-CCA-R3-PC, 2009 WL 160926, at *2 (Tenn. Crim. App. Jan. 23, 2009) (same); *Proby v. State*, No. W2008-00700-CCA-R3-PC, 2008 WL 4756678, at *2 (Tenn. Crim. App. Oct. 27, 2008).

The only consistency among the states, therefore, is that prisoners cannot obtain relief for these kinds of violations of their Sixth Amendment rights: when deeming *Blakely* a new rule forecloses relief, states adopt that option, but when deeming *Blakely* a new rule *allows* a claim to go forward, states reject that conclusion. The question whether *Blakely* announced a new rule boils down to a system of “heads I win, tails you lose.”

2. The Ninth and Tenth Circuits, the only federal courts of appeals to address the issue so far, have held that *Blakely* does not apply retroactively on collateral review because it is not a watershed rule of criminal procedure. *See Schardt*, 414 F.3d at 1036; *Allen*, 427 F.3d at 774. All state courts to address the issue likewise have held that *Blakely* does not fit *Teague*’s “watershed” exception. *See Johnson*, 142 P.3d at 724; *Houston*, 702 N.W.2d at 273; *Lutz v. Hill*, 134 P.3d 1003, 1005 (Or. Ct. App. 2006); *Evans*, 114 P.3d at 632-33.

B. Lower Courts Continue To Face The Questions Presented.

The question presented in this case is just as important now as it was when this Court granted certiorari in *Burton*. It is obvious that if this Court were to hold that *Blakely* is a “watershed” rule of criminal procedure, then a substantial number of prisoners would be able to seek relief. Perhaps less obvious, however, is that even if this Court were to hold that *Blakely* was not a new rule at all – and thus that only prisoners whose sentences became final between June of 2000 and June of 2004 could seek federal habeas relief on *Apprendi/Blakely* grounds – then that decision would affect a still significant number of cases.

During 2008 and the first three months of 2009 alone, federal district courts decided at least nineteen cases on the merits involving claims like petitioner’s – that is, claims from state prisoners whose sentences became final after *Apprendi* but before *Blakely* that their sentences violate the Sixth Amendment.⁶

⁶ See *Arenz v. Giurbino*, No. CV 05-06624, 2009 WL 772912 at *25 (C.D. Cal., Mar. 20, 2009); *O’Meara v. Feneis*, No. 07-1428, 2009 WL 515887 at *2-4 (D. Minn. Mar. 2, 2009); *Wiggins v. Jackson*, No. 3:05CV346-1-MU, 2009 WL 484668 at *22-24 (W.D.N.C. Feb. 25, 2009); *Harrison v. Mule Creek State Prison*, No. CV F 03-5122, 2009 WL 453113 at *42-43 (E.D. Cal. Feb. 23, 2009); *Xavier v. Evans*, No. C 08-3299, 2009 WL 150962 at *2 (N.D. Cal., Jan. 21, 2009); *Mathews v. Sec’y, Dep’t of Corrections*, No. 8:08-cv-512-T-17MAP, 2008 WL 5111239 at *24 (M. D. Fla., Dec. 3, 2008); *Garcia v. Palosuari*, No. CV08-0691-PHX-SRB, 2008 WL 4999159, at *5 (D. Ariz., Nov. 21, 2008); *Schuller v. Horel*, No. EDCV 08-1128-PA, 2008 WL 4857947, at

District courts presumably decided other such cases without releasing opinions to electronic databases such as Westlaw. And district courts dismissed numerous other such claims as untimely or procedurally barred. *See, e.g., Spillino v. Belleque*, No. CV 05-1953-HU, 2009 WL 585929 at *8 (D. Or., Mar. 5, 2009); *King v. Yates*, No. 1:08-cv-00276-TAG, 2009 WL 498135 at *6 (E.D. Cal. Feb. 28, 2009); *Brignac v. Haviland*, No. CV 08-07612, 2009 WL 499097 at *3 (C.D. Cal. Feb. 26, 2009). Unless and until this Court steps in, federal courts of appeals and district courts will continue to consider these claims without the certainty that only this Court can deliver.

*2-3 (C.D. Cal., Nov. 3, 2008); *Wilmoth v. Schriro*, No. CV 03-0795-PHX-MHM, 2008 WL 4446684, at *4-6 (D. Ariz., Sept. 29, 2008); *Phong Le v. Hartley*, No. 07-cv-01173-WYD-BNB, 2008 WL 4293315, at *4-5 (D. Colo., Sept. 15, 2008); *Victory v. Lewis*, No. C 03-1061, 2008 WL 3926406, at *35-37 (N.D. Cal., Aug. 25, 2008); *Pope v. Campbell*, No. C 06-1829, 2008 WL 2783484, at *17 (N.D. Cal., July 17, 2008); *Barber v. Brunsman*, No. 3:08cv105, 2008 WL 2791893, at *3-4 (S.D. Ohio, July 16, 2008); *Febles v. Rider*, No. CV07-0728-PHX-SRB, 2008 WL 2668945, at *11-12 (D. Ariz., June 30, 2008); *Colvin v. Powers*, No. 07-2615, 2008 WL 2397332, at *12-13 (D.N.J., June 12, 2008); *Gomoli v. Schriro*, No. CV-07-0449-PHX-PGR, 2008 WL 2097412, at *7-9 (D. Ariz., May 19, 2008); *Dunn v. Hill*, No. 07-420-TC, 2008 WL 1967723, at *4-6 (D. Or., May 5, 2008); *Palenzuela v. Ollison*, No. CV 06-4600-FMC(E), 2008 WL 1944140, at *27-28 (C.D. Cal., May 1, 2008); *Oloba-Aisony v. Scribner*, No. CV06-4976-SGL(E), 2008 WL 1777220, at *54-55 (C.D. Cal., Apr. 3, 2008).

II. This Case Is An Excellent Vehicle For Determining Whether The Holding In *Blakely* Is A New Rule And, If So, Whether *Blakely* Applies Retroactively.

Three aspects of this case make it an excellent vehicle to resolve the question left unresolved in *Burton*.

First, this case is free of any procedural defects that would prevent the Court from determining the questions presented. This is petitioner's first habeas petition. Petitioner also raised the issue in state courts, and those courts rejected the claim on the merits. *See* Pet. App. 24a.

Second, petitioner's sentence became final between the decisions in *Apprendi* and *Blakely*. This enables the Court to decide both whether *Blakely* is a new rule, and if it is, whether it should apply retroactively under *Teague*.⁷

Third, this case puts the importance of the question presented to individual prisoners in stark relief. The trial court enhanced petitioner's sentence by *more than twenty years* based on its own factual findings. That enhancement indisputably violated petitioner's Sixth Amendment right to jury trial. Yet the Washington courts refused to grant petitioner any kind of relief. Given the stakes for petitioner (and countless others like him), this Court should be

⁷ *Ring* was also on the books before petitioner's sentence became final. Accordingly, this Court could also use this case to decide whether *Ring* meaningfully added to *Apprendi*.

the one to decide whether petitioner may obtain federal habeas relief for this constitutional violation.

III. The Ninth Circuit's Decision Is Wrong On The Merits.

A. This Court's Decision In *Blakely* Did Not Announce A "New Rule."

1. a. In *Teague v. Lane*, 489 U.S. 288 (1989), the plurality opinion explained when a case announces a "new" rule:

In general . . . a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final.

Id. at 301 (internal citations omitted).⁸ This Court ratified the general test later that same Term, *see Penry v. Lynaugh*, 492 U.S. 302, 314 (1989), and has reaffirmed its formulations many times since. *See, e.g., Beard v. Banks*, 542 U.S. 406, 413 (2004); *Lambrix v. Singletary*, 520 U.S. 518, 527-28 (1997).

By contrast, a decision does not announce a new rule when it is "merely an application of the principle that governed" a prior Supreme Court case. *Teague*, 489 U.S. at 307. As Justice Kennedy has explained, "we ask whether the decision in question was

⁸ All citations to *Teague* from this point forward are to the plurality opinion.

dictated by precedent" in recognition of "[t]he comity interest served by *Teague*." *Wright v. West*, 505 U.S. 277, 308 (1992) (Kennedy, J., concurring in judgment). If "all reasonable jurists" would have realized such precedent compelled the holding in the later decision, there is nothing unfair or subversive of federalism in applying the later decision to the prisoner's federal habeas claim. *Beard*, 542 U.S. at 413 (quoting *Lambrrix*, 520 U.S. at 528).

Teague itself pointed to an example of a decision that simply applied the rule that governed a prior case and, therefore, did not announce a new rule: *Francis v. Franklin*, 471 U.S. 307 (1985), cited in *Teague*, 489 U.S. at 307. In *Francis*, this Court held that a jury instruction that allowed the jury to presume malice unconstitutionally relieved the state of its burden of proof beyond a reasonable doubt. It explained its decision this way:

Sandstrom v. Montana [442 U.S. 510 (1979)] made clear that the Due Process Clause of the Fourteenth Amendment prohibits the State from making use of jury instructions that have the effect of relieving the State of the burden of proof enunciated in [*In re Winship*, 397 U.S. 358 (1970)] on the critical question of intent in a criminal prosecution. 442 U.S. at 521. Today, we reaffirm the rule of *Sandstrom* and the wellspring due process principle from which it was drawn. The Court of Appeals faithfully and correctly applied this rule, and the court's judgment is therefore affirmed.

Francis, 471 U.S. at 326-27. Notwithstanding the dissent's complaint that *Francis* "needlessly

extend[ed] our holding in [*Sandstrom*] to cases where the jury was not required to presume *conclusively* an element of a crime under state law," *Francis*, 471 U.S. at 332 (Rehnquist, J., dissenting) (emphasis added), this Court held unanimously three years later that *Francis* did not announce a new rule because it "was merely an application of the principle that governed our decision in *Sandstrom v. Montana*." *Yates v. Aiken*, 484 U.S. 211, 216-17 (1988), *quoted in Teague*, 489 U.S. at 307.

b. Post-*Teague* decisions from this Court reinforce that merely applying a rule announced in a prior Supreme Court case does not announce a new rule. In *Stringer v. Black*, 503 U.S. 222, 228 (1992), this court held that the decision in *Maynard v. Cartright*, 486 U.S. 356 (1988), did not announce a new rule because it "applied the same analysis and reasoning" found in a prior case. This Court further held that *Clemons v. Mississippi*, 494 U.S. 738 (1990), did not announce a new rule because differences between the sentencing rule at issue there and the one in *Clemons* "could not have been considered a basis for denying relief in light of precedent existing at the time petitioner's sentence became final." *Stringer*, 503 U.S. at 229.

In *Williams v. Taylor*, 529 U.S. 362 (2000), this Court applied its decision in *Strickland v. Washington*, 466 U.S. 668 (1984), to a petitioner's federal habeas claim. This Court explained:

That the *Strickland* test "of necessity requires a case-by-case examination of the evidence," *Wright*, 505 U.S. at 308 (Kennedy, J., concurring in judgment),

obviates neither the clarity of the rule nor the extent to which the rule must be seen as “established” by this Court. This Court’s precedent “dictated” that the Virginia Supreme Court apply the *Strickland* test at the time that court entertained Williams’ ineffective-assistance claim. *Teague*, 489 U.S. at 301. And it can hardly be said that recognizing the right to effective counsel “breaks new ground or imposes a new obligation on the States.”

Williams, 529 U.S. at 391 (quoting *Teague*, 489 U.S. at 301). Even though the precise basis for Williams’ contention that he received ineffective assistance was different than the petitioner’s in *Strickland*, Williams was nonetheless entitled to a full application of *Strickland*’s general rule. *Id.*

2. This Court’s opinions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004), as well as a comparison between the underlying sentencing laws at issue in those cases, demonstrate that *Blakely* simply applied the rule already announced in *Apprendi*. It broke no new ground in holding that Washington’s procedures for finding the aggravating facts supporting exceptional sentences were unconstitutional.

a. In *Apprendi*, this Court considered the legality of New Jersey’s system for imposing a certain “sentence enhancement.” Under that system, a defendant convicted of a given crime was subject to a statutorily established maximum sentence (in *Apprendi*’s case, 10 years). A second statute,

however, provided that a sentencing court could impose “an extended term of imprisonment” – up to 20 years – if it found by a preponderance of the evidence that the defendant acted with a purpose to intimidate an individual or group on the basis of race or a similar characteristic. 530 U.S. at 468-69.

This Court ruled that New Jersey’s sentence-enhancement system ran afoul of the Sixth and Fourteenth Amendments, holding that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” 530 U.S. at 490. But this Court did not stop there. It went on to explain that the “statutory maximum” in a given sentencing scheme consists of “the maximum [a defendant] would receive *if punished according to the facts reflected in the jury verdict alone*.” *Id.* at 483 (emphasis added); *see also id.* at 483 n.10 (the statutory maximum is the statutory “outer limit[]” based on “the facts alleged in the indictment and found by the jury”). *Apprendi* explained, in other words, that “the relevant inquiry is not one of form, but of effect – does the required finding expose the defendant to a greater punishment *than that authorized by the jury’s guilty verdict?*” *Id.* at 494 (emphasis added). Because the hate-crime enhancement at issue there “increased . . . the maximum range within which the judge could exercise his discretion,” this Court held that the trial court erred in imposing the enhancement based on a fact that it had found by a mere preponderance of the evidence. *Id.* at 474; *see also id.* at 491-92.

Four years later, in *Blakely*, this Court confronted Washington's system for imposing exceptional sentences. Under that system, a defendant convicted of a given crime or crimes was subject to a statutorily established "standard," or "presumptive," statutory range. A second statute, however, empowered sentencing courts to impose a longer – so-called "exceptional" – sentence if they found one or more "aggravating facts" beyond those encompassed in the guilty verdict. *See Blakely*, 542 U.S. at 299-300. This Court held that the Washington system was unconstitutional in the same way as the New Jersey system in *Apprendi* had been.

One need look no further than the language in *Blakely* itself to understand that *Blakely* did nothing more than apply the rule of *Apprendi*. At the outset of its analysis, this Court explained that: "This case requires us to *apply the rule we expressed in Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)." *Blakely*, 542 U.S. at 301 (emphasis added). The State argued that the "statutory maximum" in Washington's system was not the statute setting the maximum sentence based solely on the guilty verdict (in *Blakely*'s case, 53 months), but instead was the statute establishing the maximum possible exceptional sentence (10 years). *Id.* at 303.

This Court, however, rejected the State's argument, holding in no uncertain terms:

Our precedents *make clear . . .* that the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts*

reflected in the jury verdict or admitted by the defendant.

542 U.S. at 303 (first emphasis added); *compare Yates*, 484 U.S. at 216-17 (*Francis* did not announce new rule in part because it explained that prior precedent “made clear” that state’s argument lacked merit). For this proposition, this Court cited and quoted *Apprendi*’s statement that the statutory maximum is the statute setting “the maximum [a defendant] would receive if punished according to the facts reflected in the guilty verdict alone.” *Blakely*, 542 U.S. at 303 (quoting and citing *Apprendi*, 466 U.S. at 483).

Lest there be any doubt that *Blakely* broke no new legal ground, this Court further explained that “[t]he ‘maximum sentence’ is *no more* 10 years here than it was 20 years in *Apprendi* (because that is what the judge could have imposed upon finding a hate crime).” *Blakely*, 542 U.S. at 304 (emphasis added). This Court’s “commitment to *Apprendi* in this context” reflected nothing more than “respect for longstanding precedent” and a continuing need to give “intelligible content to the right to jury trial.” *Blakely*, 542 U.S. at 305; *compare Apprendi*, 530 U.S. at 499 (Scalia, J., concurring) (*Apprendi* rule is necessary to give “intelligible content” to jury trial right). And the most any dissenter claimed was simply that this Court in *Blakely* made clear “it mean[t] what it said in *Apprendi*.” *Blakely*, 542 U.S. at 328 (Breyer, J., dissenting).

Indeed, instead of basing their disagreement on the holding in *Blakely*, the *Blakely* dissenters directed their ire at the rule of *Apprendi* itself. *See*,

e.g., 542 U.S. at 321 (O'Connor, J., dissenting) (explaining that the "*Apprendi* dissenters" were unwilling to follow its rule here); *id.* at 333 (Breyer, J., dissenting) (criticizing what sentencing systems have to do to conform "to *Apprendi*'s dictates"); *compare id.* at 306 (majority opinion) (referring to dissenters as "[t]hose who would reject *Apprendi*"). That presumably is why Justice O'Connor went so far as to concede that, on the basis of *Teague*'s "dictated by precedent" principle, "all criminal sentences imposed under [systems similar to Washington's] since *Apprendi* was decided in 2000 arguably remain open to collateral attack." 542 U.S. at 323-24 (O'Connor, J., dissenting) (citing *Teague*, 489 U.S. at 301, for the proposition that "a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final").

All that was necessary to reach the result in *Blakely*, in short, was to recognize *Apprendi*'s definition of "statutory maximum" and to apply it with equal force to a sentencing system that was colloquially known as a "sentencing guidelines" system. See Kate Stith, *Crime and Punishment Under the Constitution*, 2004 SUP. CT. REV. 221, 252-55 (2004) (*Apprendi* "foreordained" the result in *Blakely*; "[a]ll the Court had to do to decide *Blakely* was to apply the rule exactly as *Apprendi* had stated it."); R. Craig Green, *Apprendi's Limits*, 39 U. RICH. L. REV. 1155, 1169-82 (2005) ("the Court simply restated and applied *Apprendi*'s rule" in an "identical" manner). Indeed, in 2001, the Kansas Supreme Court unanimously invalidated the procedures in the Kansas Sentencing Guidelines for

imposing enhanced sentences, accepting that “[u]nder *Apprendi*” the statutory maximum is the maximum punishment “authorized by the jury’s verdict.” *State v. Gould*, 23 P.3d 801, 812-13 (Kan. 2001). The Washington Supreme Court, however, had upheld its exceptional sentence system by doing something no “reasonable jurists,” *Beard*, 542 U.S. at 413 (quoting *Lambrix*, 520 U.S. at 528), would have done: failing to heed *Apprendi*’s definition of “statutory maximum” and its express admonition that applying this definition is a question “not of form, but of effect,” 530 U.S. at 494. *State v. Gore*, 21 P.3d 262, 276-77 (Wash. 2001). The holding in *Blakely* simply forced Washington, as Kansas was already doing, to abide by clearly established law.

In holding that *Blakely* established a new rule, the Ninth Circuit replicated the Washington courts’ mistake: it ignored the definition of “statutory maximum” that *Apprendi* already had announced and this Court’s admonition to focus not on the form, but on the effect, of sentencing laws. *See Schardt v. Payne*, 414 F.3d 1025, 1035 (9th Cir. 2005). Once those directions are taken into account, it is clear that *Apprendi* foreordained the result in *Blakely*.

b. The Ninth Circuit’s decision that *Blakely* announced a new rule depends to a great extent on its view that this Court’s decision in a *different* case – *United States v. Booker*, 543 U.S. 220 (2005) – was not dictated by *Apprendi*. *See Schardt*, 414 F.3d at 1035. This analysis, however, fails to appreciate the difference between the Washington sentencing system at issue in *Blakely* and the Federal Sentencing Guidelines.

The Washington sentencing system at issue in *Blakely*, just like the New Jersey system in *Apprendi*, involved two *statutorily established* sentencing maximums: one for committing the crime without any aggravating circumstances, and one for committing the crime with at least one aggravating circumstance. In Washington, just as in New Jersey, judges were empowered to find facts necessary to expose defendants to the higher maximum sentence.

The Federal Sentencing Guidelines at issue in *Booker*, by contrast, did not present a situation of dueling statutory maximums. For any given federal crime, the United States Code establishes a single maximum permissible sentence. At the time of *Booker*, the Guidelines limited judicial discretion to impose sentences up to the statutorily authorized maximums only by “quasi-legislative” rules enacted by an independent commission in the judicial branch. See *Mistretta v. United States*, 488 U.S. 361, 393 (1989). As Justice Thomas’ concurrence in *Apprendi* indicated, therefore, the “unique status” of the Guidelines kept them from squarely implicating *Apprendi*’s “statutory maximum” rule and – for a time, at least – raised the possibility that they might be exempt from the *Apprendi* doctrine. 530 U.S. at 523 n.11 (Thomas, J., concurring).

Booker, to be sure, extended the *Apprendi* doctrine to cover binding thresholds in both statutory and non-statutory sentencing systems. But along the way, *Booker* further confirmed that *Blakely* had been dictated by *Apprendi*. The *Booker* Court first reiterated that “the requirements of the Sixth Amendment were *clear*” in *Blakely*. 543 U.S. at 232 (emphasis added). By contrast, it recognized that

when it came to the Federal Guidelines, that the Court was required to assess the general "principles" that *Apprendi* had "sought to vindicate." *Id.* at 238. After undertaking this assessment, this Court held that the Sixth Amendment fact-finding requirements in *Apprendi* should apply "[r]egardless of whether the legal basis of the accusation is in a statute or in guidelines promulgated by an independent commission." *Id.* at 239.

Justice Breyer's opinion dissenting in part (for the same four Justices who dissented in *Blakely*) echoed this analysis. Unlike the dissenting opinions in *Blakely*, which had accepted that the result there was compelled by *Apprendi*, Justice Breyer's dissent in *Booker* argued that there was actually a "principled basis for refusing to extend *Apprendi*'s rule" to the Guidelines. *Booker*, 543 U.S. at 334 (Breyer, J., dissenting in part). That basis, the dissent explained, was that the Guidelines involve mere "administrative rules," so they do not allow Congress to label factual inquiries that should be elements as sentencing factors and thereby evade the beyond-a-reasonable-doubt and jury-trial guarantees. *Id.* at 331-32. Furthermore, administrative rules created by a commission in the Judicial Branch resemble appellate decisionmaking concerning the reasonableness of sentences, which falls outside of *Apprendi*'s rule. To the extent *Blakely* could be read as implying that the *Apprendi* doctrine should apply with equal force to such rules, *Blakely* did not have to extend *Apprendi* in that manner because "*Blakely*, like *Apprendi*, involved sentences embodied in a statute." *Id.* at 332 (Breyer, J., dissenting in part).

In sum, the inquiry whether *Apprendi* dictated *Blakely* is not the same as whether *Apprendi* dictated *Booker*. This Court need not address here the latter question. The only question presented here is whether the *holding* of *Blakely* – i.e., that when there are two statutory sentencing thresholds, the statutory maximum for Sixth and Fourteenth Amendment purposes is “the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*,” 542 U.S. at 303 – was dictated by *Apprendi*. There can be no doubt that the answer is yes.

B. If *Blakely* Did Announce A New Rule, It Announced A Watershed Rule Of Criminal Procedure.

Even if *Blakely* somehow established a new rule, petitioner would still be entitled to relief because the *Blakely* rule qualifies as a “watershed rule[] of criminal procedure.” *Teague*, 489 U.S. at 311. This exception to the general bar on retroactively applying new rules of criminal procedure to state prisoners gives life to Justice Harlan’s observation – echoed contemporaneously by Justice Powell and Judge Friendly and in later years repeatedly by this Court – that a central purpose of federal habeas review is to ensure that “no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted.” *Desist v. United States*, 394 U.S. 244, 262 (1969) (Harlan, J., dissenting), *quoted in Teague*, 489 U.S. at 312; *see also O’Neal v. McAninch*, 513 U.S. 432, 442 (1995) (the “basic purposes underlying the writ” include

addressing "the sort [of constitutional error] that risks an unreliable trial outcome and the consequent conviction of an innocent person"); *Stone v. Powell*, 428 U.S. 465, 491-92 n.31 (1976) (habeas rules should "safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty"). This concern, of course, encompasses not only imprisoning individuals who are innocent of committing any crime but also those who committed some transgression but are innocent of a more serious offense for which a state is punishing them. Even when a state court's infringement of a constitutional rule was not apparent while a case was on direct review, federal courts must apply a "watershed" rule retroactively, in short, to address the "impermissibly large risk," *Desist*, 394 U.S. at 262, that a person may be serving prison time for something he did not do.

"To fall within this exception, a new rule must meet two requirements: [1] Infringement of the rule must seriously diminish the likelihood of obtaining an accurate conviction, and [2] the rule must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Tyler v. Cain*, 533 U.S. 656, 665 (2001) (internal quotations and citations omitted). The *Blakely* rule satisfies each of these tests.

1. *Infringing the Blakely Rule Seriously Diminishes the Likelihood of Obtaining An Accurate Conviction.*

The *Apprendi/Blakely* rule has two distinct components: one goes to the appropriate finder of facts (the jury) and the other goes to the level of

certainty with which those facts may be found (beyond a reasonable doubt). *See Apprendi*, 530 U.S. at 476-78; *Blakely*, 542 U.S. at 301. Although this Court held in *Schriro v. Summerlin*, 542 U.S. 348 (2004), that infringing the jury-trial component of *Apprendi*'s rule (and by implication, *Blakely*'s rule) does not seriously diminish the likelihood of obtaining an accurate conviction, there is no question that infringing the reasonable doubt component of the *Apprendi/Blakely* rule – as the Washington courts did here – does so.

In a pair of pre-*Teague* cases, in fact, this Court found precisely that. In *Ivan V. v. City of New York*, 407 U.S. 203 (1972), this Court addressed the question whether, under its old retroactivity jurisprudence, failing to apply the beyond-a-reasonable-doubt rule of *In re Winship*, 397 U.S. 358 (1970), “substantially impairs [a criminal trial’s] truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials.” *Ivan V.*, 407 U.S. at 204. This Court held that it did, because “the major purpose” of using the constitutional standard of proof beyond a reasonable doubt instead of by a preponderance is “to overcome an aspect of a criminal trial that substantially impairs the truth-finding function.” *Id.* at 205; *see also Brinegar v. United States*, 338 U.S. 160, 174 (1949) (reasonable doubt standard “developed to safeguard men from dubious and unjust convictions”). Several years later, again applying the same test, this Court made clear that failing to use the reasonable doubt standard *even with respect to only one element of a crime* “substantially impairs the truth-finding function” of trial just as impermissibly

as failing to use that standard across the board. *Hankerson v. North Carolina*, 432 U.S. 233, 242 (1977). "The reasonable-doubt standard of proof is as 'substantial' a requirement under [*Mullaney v. Wilbur*, 421 U.S. 684 (1975)] as it was in *Winship*" because failing to use that standard with respect to a single element raises equally "serious questions about the accuracy of guilty verdicts in past trials." *Id.* at 243-44.

These holdings make eminent sense and should control under *Teague* as well. Whereas the reasonable doubt standard requires a fact finder to "reach a subjective state of certitude of the facts in issue," the preponderance standard "calls on the trier of fact merely to perform an abstract weighing of the evidence in order to determine which side has produced the greater quantum, without regard to its effect in convincing his mind of the truth of the proposition asserted." *Winship*, 397 U.S. at 364, 368 (quotation and citation omitted). It follows ineluctably that using a preponderance standard instead of the reasonable doubt standard presents "a *far greater* risk of factual errors that result in convicting the innocent." *Id.* at 371 (Harlan, J., concurring) (emphasis added); *see also Lego v. Twomey*, 404 U.S. 477, 493 (1972) (Brennan, J., dissenting) ("Permitting proof by a preponderance of the evidence would necessarily result in the conviction of more defendants who are in fact innocent."). And this Court made clear in *Apprendi* and *Blakely* that even when a jury has found a defendant guilty beyond a reasonable doubt of a certain crime, the same inordinate level of risk is present when courts use a preponderance standard to

assess whether the defendant should be punished more severely than a jury verdict alone allows. *See Apprendi*, 530 U.S. at 484-85; *Blakely*, 542 U.S. at 306, 311-12.

The Ninth Circuit has nevertheless opined that violating the *Blakely* rule does not undermine accuracy because the rule "does not affect the determination of a defendant's guilt or innocence" but rather "addresses only how a court imposes a sentence, once a defendant has been convicted." *Schardt*, 414 F.3d at 1036 (quotation marks and citation omitted). But this statement ignores the very holdings of *Blakely* and *Apprendi*. Those decisions hold that a "sentence enhancement" or "aggravating factor" that exposes a defendant to a longer sentence is "the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict." *Apprendi*, 530 U.S. at 494 n.19; *see also Blakely*, 542 U.S. at 310-11 (repeatedly referring to sentence enhancements covered by *Blakely* as "elements"); *Washington v. Recuenco*, 548 U.S. 212, 220 (2006) (holding of *Apprendi* is that "elements and sentencing factors must be treated the same for Sixth Amendment purposes"). In other words, a State may not "circumvent the protections of *Winship* merely by 'redefin[ing] the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment.'" *Apprendi*, 530 U.S. at 485 (quoting *Mullaney*, 421 U.S. at 698). Accordingly, the constitutional violation that *Blakely* addresses is failing to use the proper procedural protections (specifically, a jury and the beyond a reasonable doubt standard) for determining whether a defendant is guilty of an aggravated crime.

That is exactly the sort of error that this Court has made abundantly clear seriously diminishes the likelihood of obtaining an accurate conviction.

2. The Blakely Rule Implicates Our Understanding Of The Bedrock Procedural Elements Essential To The Fairness Of A Proceeding.

The Ninth Circuit also erred in holding that the *Blakely* rule does not satisfy the "bedrock" prong of *Teague's* watershed exception. The court concluded that neither the beyond-a-reasonable-doubt component nor the jury-trial component of the rule involves "the sort of error that necessarily undermines the fairness . . . of criminal proceedings." *Schardt*, 414 F.3d at 1036. Both of these conclusions are mistaken. Each of the components of the *Blakely* rule independently satisfies this prong of *Teague's* watershed exception.

a. *Blakely's* requirement that certain facts be found beyond a reasonable doubt is a "bedrock procedural element essential to the fairness of a proceeding." *Tyler*, 533 U.S. at 665 (internal quotation marks omitted). This Court's opinion in *Winship* leaves little doubt that the reasonable doubt standard is indispensable to any criminal adjudication:

The reasonable-doubt standard plays a *vital role* in the American scheme of criminal procedure. It is a *prime instrument* for reducing the risk of convictions resting on factual error. The standard provides concrete substance for

the presumption of innocence – *that bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law. . . .*

[A] person accused of a crime . . . would be at a severe disadvantage, *a disadvantage amounting to a lack of fundamental fairness*, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case.

397 U.S. at 363 (emphasis added) (internal quotation marks and citation omitted); *see also id.* at 372 (Harlan, J., concurring) (using reasonable doubt standard instead of a preponderance of the evidence standard is “an expression of fundamental procedural fairness . . . for criminal trials”); *Victor v. Nebraska*, 511 U.S. 1, 5 (1994) (The reasonable doubt standard “is an ancient and honored aspect of our criminal justice system.”); *Jackson v. Virginia*, 443 U.S. 307, 317-18 (1979) (a conviction that does not satisfy so “fundamental a substantive constitutional standard” cannot stand).

Applying the reasonable doubt standard is just as important when the relevant facts expose defendants to punishment beyond otherwise applicable statutory maximums as it is with respect to other elements of crimes. This Court reiterated in *Apprendi*, in just this context, that the reasonable doubt standard is a “constitutional protection[] of surpassing importance.” 530 U.S. at 476. Without this rule, a defendant guilty of doing something wrong – but not something as serious as the government alleged –

could see his sentence “balloon . . . based not on facts proved to his peers beyond a reasonable doubt, but on facts extracted after trial from a report compiled by a probation officer who the judge thinks more likely got it right than got it wrong.” *Blakely*, 542 U.S. at 311-12; see also *id.* at 306 (dispensing with the *Blakely* rule “would mean, for example, that a judge could sentence a man for committing murder even if the jury convicted him only of illegally possessing the firearm used to commit it – or of making an illegal lane change while fleeing the death scene.”). Such a regime would controvert our most fundamental conceptions of liberty.

b. Even if the beyond-a-reasonable-doubt component of *Blakely*’s rule did not implicate the bedrock procedural elements essential to the fairness of a proceeding, the jury-trial component of the rule would. While the Ninth Circuit suggested that this Court’s decision in *Schriro v. Summerlin*, 542 U.S. 348 (2004), foreclosed such a conclusion, see *Schardt*, 414 F.3d at 1036, this is incorrect. *Schriro* held only that requiring a jury to find a fact exposing a defendant to heightened punishment did not satisfy the accuracy prong of *Teague*’s watershed exception, see *Schriro*, 542 U.S. at 355-58; this Court did not address the “bedrock” prong. A straightforward application of that prong dictates that the jury-trial component of *Blakely*’s rule satisfies it.

This Court has never wavered from the proposition that the right to trial by jury – a right that is “several centuries” old – is “fundamental to the American scheme of justice.” *Duncan v. Louisiana*, 391 U.S. 145, 149-51 (1968); see also *Schriro*, 542 U.S. at 358 (“The right to jury trial is

fundamental to our system of criminal justice"). It "reflect[s] a fundamental decision about the exercise of official power," as well as "a profound judgment about the way in which law should be enforced and justice administered." *Duncan*, 391 U.S. at 155-56. The jury is indispensable because it is the one decisionmaker that "stand[s] between the individual and the power of the government." *Booker*, 543 U.S. at 237.

If this Court's recent decisions have made anything clear, it is that the right to jury trial is just as important in the context of factual determinations that expose defendants to heightened punishment as it is during the rest of trial. This Court explained in *Blakely* that the principle that juries must find every fact "the law makes essential to the punishment" has been "acknowledged by courts and treatises since the earliest days of graduated sentencing." *Blakely*, 542 U.S. at 302 (quotation and citation omitted). It continued:

That right is no mere procedural formality, but a *fundamental reservation of power in our constitutional structure*. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.

Blakely, 542 U.S. at 305-06 (emphasis added). The *Blakely* rule is necessary, therefore, to prevent the jury from being "relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to

punish.” *Id.* at 306; *see also Jones v. United States*, 526 U.S. 227, 243-44 (1999) (absent such a rule “the jury’s role would . . . shrink from the significance usually carried by determinations of guilt to the relative importance of low-level gatekeeping”). Like the right to counsel at issue in *Gideon v. Wainwright*, 372 U.S. 335 (1963), which this Court has identified as a watershed rule, *see Beard*, 542 U.S. at 417-18, the right to a jury determination concerning every fact essential to punishment “may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.” *Gideon*, 372 U.S. at 344.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 2009

APPENDIX

APPENDIX A

NOT FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

ROBERT DURALL,

Petitioner-Appellant,

v.

KENNETH QUINN,
Superintendent, WRSU,

Respondent-Appellee.

No. 07-35756

D.C. No. CV-06-1012-MJP

MEMORANDUM*

FILED

JAN 13 2009

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

Appeal from the United States District Court
for the Western District of Washington
Marsha J. Pechman, District Judge, Presiding

Argued and Submitted December 11, 2008
Seattle, Washington

Before GOULD, TALLMAN, and CALLAHAN,
Circuit Judges.

Robert Durall appeals the district court's denial of
his habeas corpus petition. We have jurisdiction

* This disposition is not appropriate for publication and is not
precedent except as provided by 9th Cir. R. 36-3.

pursuant to 28 U.S.C. §§ 2253 and 1291, and we affirm.

Durall first contends the state court erred when it failed to apply a presumption of prejudice to his claim of improper juror contact. We assume, without deciding, that the presumption of prejudice would apply in this case. See *United States v. Rutherford*, 371 F.3d 634, 643 (9th Cir. 2004). Because the state courts applied a contrary standard, we review *de novo*. *Caliendo v. Warden of Cal. Men's Colony*, 365 F.3d 691, 698 (9th Cir. 2004). The record convinces us the government has rebutted the presumption of prejudice. *United States v. Simtob*, 485 F.3d 1058, 1064 (9th Cir. 2007). The trial court's remedial measures following an evidentiary hearing rendered the improper contact harmless beyond a reasonable doubt. *United States v. Dutkel*, 192 F.3d 893, 899 (9th Cir. 1999).

Durall next contends his counsel was ineffective because he altered an evidentiary agreement between Durall and the state without Durall's consent. Even if counsel's performance was deficient, Durall has failed to show prejudice arising from the alteration. He cites to no evidence supporting the conclusion that "There is reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986); *Strickland v. Washington*, 466 U.S. 668, 694 (1984). The failure to point to such evidence also forecloses Durall's request for an evidentiary hearing. See *Houston v. Schomig*, 533 F.3d 1076, 1083 (9th Cir. 2008); *Earp v. Ornoski*, 431 F.3d 1158, 1167 (9th Cir. 2005).

Finally, Durall argues *Blakely v. Washington*, should apply retroactively to invalidate his upper-term sentence. This argument is foreclosed by *Schardt v. Payne*, 414 F.3d 1025, 1036 (9th Cir. 2005).

Based upon our independent review of the record, we conclude that the state court's decision rejecting Durall's claims was not contrary to, and did not involve an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, nor was it based on an unreasonable determination of the facts in light of the evidence presented in state court. 28 U.S.C. § 2254(d).

We construe Durall's briefing of uncertified issues as a motion to expand the certificate of appealability, and we deny the motion. *See* 9th Cir. R. 22-1(e); *Hiivala v. Wood*, 195 F.3d 1098, 1104-05 (9th Cir. 1999) (per curiam).

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ROBERT DURALL,

Petitioner,

KENNETH QUINN,

Respondent.

No. 06-cv-01012-MJP-
MAT

ORDER ADOPTING
REPORT AND
RECOMMENDATION
AND DENYING
PETITION FOR WRIT
OF HABEAS CORPUS

Overview

State prisoner Robert Durall ("Durall") has filed objections to the Magistrate Judge's Report and Recommendation ("R & R"), which recommended denying Durall's petition for a writ of habeas corpus. Upon review of the record (Dk. Nos. 4, 13, 16, 19, 20, 21) and documents submitted by the parties, this Court ADOPTS the Magistrate Judge's R & R¹ and DENIES Durall's petition.

¹ While this Court adopts the R & R's ultimate conclusions and much of its reasoning, there are some issues for which this Court wishes to put its own legal analysis on the record. For other issues, this Court will adopt the R & R's analysis without significant elaboration.

Background

This Court adopts the factual and procedural background of this case as set forth in the R& R.

Standard of Review

Regarding claims that were adjudicated on the merits in state court, this Court may only grant habeas relief if the state court decision was contrary to, or involved an unreasonable application of, clearly established Supreme Court precedent, or if the state court decision was based on an unreasonable determination of the facts. See 28 U.S.C. § 2254(d). In conducting this inquiry, this Court reviews the “last reasoned decision” of the state courts. See, e.g. *Robinson v. Ignacio*, 360 F.3d 1044, 1055 (9th Cir. 2004). For most of Durall’s claims, the last reasoned decision was the decision of the Washington Supreme Court Commissioner (“Commissioner”) denying review of Durall’s Personal Restraint Petition. This Court may not grant habeas relief on a particular claim if a petitioner failed to exhaust state court remedies as to that claim and the claim would now be procedurally barred in state court. See *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991).

Analysis

- A. Durall’s Sixth Amendment right to counsel was not violated by the introduction of notes and testimony from Durall’s private investigator.**

Durall argues that he was denied his Sixth Amendment right to counsel when the prosecution introduced notes and testimony from Durall’s

conversation with his private investigator. The Commissioner held that, even if the introduction of this evidence violated Durall's attorney-client privilege, the privilege is not of constitutional magnitude. Furthermore, the Commissioner held that Durall did not suffer prejudice from the claimed error.

The Commissioner's two grounds for denying relief were not unreasonable. Regarding the first ground, Durall cannot point to any Supreme Court case holding that the introduction of evidence in violation of attorney-client privilege violates the Sixth Amendment. The closest case is *Weatherford v. Bursey*, 429 U.S. 545 (1977), which stated (in dicta) that government eavesdropping on attorney client conferences, coupled with introduction of evidence gleaned by such eavesdropping, *may* violate the Sixth Amendment. *Id.* at 552. But *Weatherford* did not address the introduction of evidence without prior government eavesdropping or malfeasance. Furthermore, at least two Circuits have held that the mere introduction of evidence in violation of attorney-client privilege does *not* violate the Sixth Amendment. See *United States v. Mett*, 178 F.3d 1058, 1066 (9th Cir. 1999); *Lange v. Young*, 869 F.2d 1008, 1012 n.2 (7th Cir. 1989). In light of *Weatherford*'s ambiguity, and lower court rulings on the issue, it was not unreasonable for the Commissioner to determine that introducing evidence in violation of attorney-client privilege does not violate the Sixth Amendment.

Regarding the prejudice ground, the Commissioner reasonably determined that Durall was not substantially prejudiced by the introduction of the private investigator ("P.I.") evidence. The prosecution

mainly used the P.I. evidence to indirectly discredit the testimony of Dignoraah Perez, a convenience store clerk who testified to seeing Carolyn alive one day *after* Durall had allegedly killed her. The P.I. evidence disclosed that Durall never bothered to tell his private investigator about Perez's story, thus implying that Durall knew Perez's story was false.

It is true, as Durall argues in his objections to the R & R, that Perez was a powerful defense witness and it was important for the prosecution to discredit her testimony. However, the prosecution did so in multiple ways besides the introduction of the P.I. evidence. For instance, the prosecution introduced e-mails that Durall wrote to acquaintances regarding Carolyn's disappearance, in which he omitted any mention of Perez's story and instead stated that no one had seen Carolyn since the previous day. These e-mails created the same inference as the P.I. evidence – namely, that Durall knew Perez was mistaken and therefore deliberately didn't relay her story to others. Viewing the evidence as a whole, the P.I. evidence was not an indispensable part of the prosecution's case and Durall was not substantially prejudiced by its introduction. The P.I. evidence did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993).

B. Durall's rights to due process and a fair and impartial jury were not violated by two instances of juror misconduct.

Durall argues that he was denied his rights to due process and a fair and impartial jury by two instances

where jurors engaged in ex parte communication with third parties about his case. The last reasoned decision of the state courts on this claim was the decision of the Washington Court of Appeals on direct review of Durall's conviction. The Court of Appeals concluded that Durall had not made a sufficient showing that the jurors' ex parte communications prejudiced him.

The Court of Appeals' conclusion was not unreasonable. Durall's main objection is that the Court of Appeals placed the burden on him to show prejudice, rather than putting the burden on the state to show that the ex parte communications were harmless. He cites to *Remmer v. United States*, 347 U.S. 227 (1954) for the proposition that ex parte communications with a juror about the pending case are presumptively prejudicial and the Government bears the burden of showing harmlessness. *Id.* at 229 (citing *Mattox v. United States*, 146 U.S. 140, 148-50 (1892)).

However, as the R & R points out, the prejudice presumption of *Remmer* has been limited to instances of juror *tampering*, rather than other communications with jurors. See *United States v. Dutkel*, 192 F.3d 893, 895-96 (9th Cir. 1999). Under *Dutkel*, tampering involves "an effort to influence the jury's verdict by threatening or offering inducements to one or more of the jurors." *Id.* at 895. None of the ex parte communications in this case involved any coercion or inducements of jurors. Thus, the Court of Appeals was not unreasonable in placing the burden on Durall to show prejudice.

In his objections to the R & R, Durrell cites *Caliendo v. Warden of California Men's Colony*, 365 F.3d 691 (9th Cir. 2004) for the proposition that ex parte communications with jurors are presumptively prejudicial under the *Remmer* and *Mattox* line of cases. However, *Caliendo* explicitly limited its holding to jurors' communicating with "a witnesses or interested party." 365 F.3d at 696. No such communications occurred in Durall's case.

C. Durall's rights under the Confrontation Clause were not violated by the introduction of hearsay statements from Carolyn's acquaintances.

The Commissioner determined that the introduction of hearsay statements against Durall did not violate his rights under the Confrontation Clause because those hearsay statements were not "testimonial" in nature. This conclusion was reasonable. This Court agrees with the R & R – and the Commissioner – that the hearsay statements were not "testimonial" and thus not barred by the Confrontation Clause.

D. Providing transcripts of Durall's suppression hearing to the jury during deliberations did not violate Durall's Sixth Amendment right to an impartial jury or his Sixth Amendment right to be present during all critical stages of his trial.

The last reasoned decision addressing this issue was the decision of the Court of Appeals on direct review. The Court of Appeals did not address the constitutional aspects of this issue, instead focusing on whether the trial court abused its discretion as a

matter of evidentiary law by providing the jury with the suppression hearing transcripts.

Nonetheless, this Court adopts the R & R's conclusion that providing these transcripts to the jury did not violate Durall's Sixth Amendment rights. While the Sixth Amendment provides a defendant with the right to be present at all stages of his trial, *see Illinois v. Allen*, 397 U.S. 337, 338 (1970), it does not prevent a judge from providing exhibits to the jury during deliberations. *See United States v. Sobamowo*, 892 F.2d 90, 97 (D.C. Cir. 1989) ("defendant's presence not required when exhibits are submitted to the jury during deliberations").

Furthermore, while courts acknowledge that providing transcripts to jurors may unduly emphasize the importance of those transcripts, no court has held that this problem implicates the Sixth Amendment right to a fair and impartial jury. *See, e.g. United States v. Montgomery*, 150 F.3d 983, 999-1000 (9th Cir. 1998) (analyzing decision to provide transcripts to jury as a simple evidentiary matter rather than a Sixth Amendment issue).

E. Durall was not denied effective assistance of counsel by his attorney's failure to obtain a written plea agreement in exchange for Durall's leading police to Carolyn's body.

A claim for ineffective assistance of counsel requires that: (1) Counsel was deficient, and (2) The deficient performance prejudiced the defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). The Commissioner denied Durall's claim on the first

Strickland prong, holding that his counsel was not deficient for failing to obtain a written plea agreement because Durall hadn't show that the State ever offered such an agreement in exchange for his cooperation.

The Commissioner's decision was not unreasonable. Durall has provided no evidence, besides his own assertions, that the Government offered him a plea agreement in exchange for leading police to Carolyn's body. In the absence of any showing that a plea agreement was even offered, Durall's counsel logically cannot be deficient for failing to enshrine such hypothetical plea agreement in writing.

Durall alternatively argues that, even if the Government never offered a plea agreement, his counsel was deficient for falsely *telling* him that the Government had offered a plea agreement and thereby inducing him to lead police to Carolyn's body. But the Commissioner found that Durall's counsel said no such thing, and Durall has not shown that this factual finding was unreasonable.

In his objections to the R & R, Durall argues that his counsel *must* have told him about a plea agreement, because it is objectively unreasonable that he would have led police to Carolyn's body otherwise. But this circumstantial argument is insufficient to show that the Commissioner's factual findings were unreasonable. Durall admits that he has no *direct* evidence that his counsel ever told him about a plea agreement.

Because the Commissioner reasonably determined that Durall's counsel never made statements about any plea agreement, Durall has no claim for ineffective assistance of counsel arising out these alleged statements.

F. Durall was not denied effective assistance of counsel when his attorney altered the agreement under which Durall led police to Carolyn's body in exchange for a Government promise not to introduce evidence that Dorall had led them there.

The Commissioner appears to have denied this claim on the second Strickland prong, holding that Durall was not prejudiced by his counsel's alteration of the agreement. The Commissioner's determination was not unreasonable.

The agreement at issue originally stated, in relevant part, "the State has agreed not to seek to introduce at trial or to publicize beforehand any information relating to Mr. Durall's involvement in the discovery of the body of his wife." The agreement was subsequently modified by striking the phrase "or publicize beforehand" and inserting a final sentence: "If, however, the defense introduces such information in any court proceeding, the State is no longer bound by the provisions of this agreement."

When a defendant alleges ineffective assistance arising out of a *plea* agreement, prejudice will be found if a defendant shows that there was a reasonable probability he would not have entered into the agreement but for counsel's errors. *Hill v. Lockhart*,

474 U.S. 52, 59 (1985). Although Durall's agreement was an assistance agreement rather than a plea agreement, this Court concludes that Durall must at least satisfy the Hill standard to show prejudice. That is, he must show that there was a reasonable probability he would not have entered into the assistance agreement had he known about the altered terms.

Durall cannot make this showing, for the altered terms are quite minor in relation to the overall agreement. The added sentence, allowing the Government to introduce evidence about Durall's assistance if Durall does so first, would hardly be objectionable as it still gives Durall control over whether such evidence will be admitted. The deletion of the "publication" phrase is a closer call, but still is a fairly minor change. Any defendant facing trial for murder would be far more concerned with what evidence is admitted at trial rather than what information is publicized in other forums. A court could readily conclude that there was no reasonable probability Durall would have backed out of the agreement merely on account of these minor alterations. Thus, Durall did not suffer prejudice, even if his counsel was deficient by altering the agreement without his consent.

This Court adopts the R & R's conclusion that Durall has procedurally defaulted on his argument that the alteration of the agreement violated his Fifth Amendment due process rights.

- G. Durall's constitutional rights were not violated by the admission of evidence that Durall failed to return a detective's call, "refused" a warrantless search, or hired counsel.

The last reasoned decision of the state courts on this claim was the decision of the Washington Court of Appeals on direct review, which held that the introduction of this evidence did not violate any constitutional rights. The Court of Appeals' legal determination was not unreasonable.

Durall's failure to return the police officer's call and his "refusal" of a warrantless search were really one and the same act. Durall simply neglected to call back the officer who requested a warrantless search. Durall has provided no case law suggesting that introduction of this evidence violates either his Fourth Amendment right to be free from unreasonable searches nor [*sic*] his Fifth Amendment right to silence.

The introduction of evidence that Durall hired counsel shortly after Carolyn's disappearance is a more complicated matter. The Court of Appeals held that "[t]he fact that Durall had hired an attorney was raised by Durall himself to explain his inquiries about withdrawing money from his pension plan." However, the trial transcript clearly shows that the Government elicited testimony that Durall had hired counsel, during the direct examination of witness Allen Becker.

Some courts have held that the Sixth Amendment right to counsel prohibits a prosecutor from eliciting testimony that a defendant secured counsel, even if

the defendant secured counsel before any criminal proceedings were instituted. *See, e.g. United States v. MacDonald*, 620 F.2d 559, 564 (5th Cir. 1980). However, there is no clear Supreme Court authority on this subject. Moreover, even highly protective courts will not consider it reversible error if the prosecutor briefly or "incidentally" elicits this prohibited testimony and does not emphasize it in his arguments. *See, e.g., United States v. Daoud*, 741 F.2d 478, 480 (1st Cir. 1984); *United States v. Milstead*, 671 F.2d 950, 953 (5th Cir. 1982).

In this case, the Government only briefly touched on Durall's obtaining counsel and made no mention of it in opening or closing arguments. Thus, the introduction of this evidence would not be reversible Sixth Amendment error even on direct review. It logically follows that Durall cannot obtain habeas relief on this ground. *See Duckett v. Godinez*, 67 F.3d 734, 742 (9th Cir. 1995).

For similar reasons, the prosecutor's eliciting of this testimony did not "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). The testimony that Durrall failed to return a phone call seems entirely unobjectionable, and the testimony that Durrall hired an attorney was elicited only in passing. Neither piece of evidence "infected the trial with unfairness" for due process purposes.

- H. Durall's double jeopardy rights were not violated when the jury's initial, sealed verdict was destroyed and the jury began deliberations anew with an alternate juror.**

The Commissioner determined that the jury's initial, sealed verdict was not a "final verdict" that terminated Durall's jeopardy. Thus, double jeopardy did not prohibit the trial judge from destroying that verdict, replacing a juror, and instructing the jury to deliberate anew.

The R & R concluded that the Commissioner's decision was reasonable, and this Court adopts the R & R's analysis of the issue. In his objections to the R & R, Durall argues that his situation creates a case of first impression in the field of double jeopardy. But this argument, if anything, merely reinforces this Court's conclusion that Durall may not achieve habeas relief on this claim. Durall bears the burden of showing that the state court's decision was, *inter alia*, an unreasonable application of clearly established Supreme Court precedent. *See* 28 U.S.C. § 2254(d). If there is no Supreme Court case law that clearly applies to Durall's situation, then Durall cannot meet the § 2254 standard for habeas relief.

- I. Durall's 560-month exceptional sentence did not violate his Sixth Amendment right to have a jury determine all the facts that increase punishment above the prescribed range.**

The last reasoned decision of the state courts analyzing this claim was the Commissioner's decision,

although Durall framed this claim as a *Blakely* violation before the Commissioner and as an *Apprendi* violation before this Court. See *Blakely v. Washington*, 542 U.S. 296 (2004); *Apprendi v. New Jersey*, 530 U.S. 220 (2000).

This Court adopts the R & R's conclusion that "Petitioner's argument is essentially an argument that *Blakely* should be applied retroactively to his case." And, *Blakely* does not apply retroactively to convictions that were final before *Blakely* itself was announced. *Schardt v. Payne*, 414 F.3d 1025, 1038 (9th Cir. 2005).

In his objections to the R & R, Durall argues that *Blakely* should apply retroactively to his case because *Blakely* was pending before the Supreme Court during direct review of his conviction, and because he raised what were essentially *Blakely* arguments to the state courts at that time. But this argument does not change the simple fact that Durall's conviction became final some four months before the Supreme Court decided *Blakely*. Had *Blakely* been decided just four months earlier, Durall would have had the benefit of its holding. But this timing does not mean that he is exempt from the general rule that *Blakely* does not apply retroactively in habeas proceedings.

J. Durall has procedurally defaulted on his argument that the judge violated his due process rights under *McMillan v. Pennsylvania*, 477 U.S. 79 (1986) by failing to apply a clear and convincing evidence standard to facts that enhanced Durall's sentence.

This Court adopts the R & R's conclusion that Durall has procedurally defaulted on this *McMillan* claim by not properly raising it in the state courts within the state statute of limitations.

K. Durall is not entitled to an evidentiary hearing on any of the above-captioned claims.

In his objections to the R & R, Durall points out the R & R did not address whether this Court should conduct an evidentiary hearing on any of his claims. This Court concludes that no evidentiary hearing is warranted. The vast majority of Durall's claims involve "issues that can be resolved by reference to the state court record," and thus there is no need for a hearing on these issues. *Totten v. Merkle*, 137 F.3d 1172, 1176 (9th Cir. 1998). The only issue that might conceivably be clarified by an evidentiary hearing is whether Durall's counsel falsely told Durall about a plea agreement, or whether the Government in fact *did* offer a plea agreement in exchange for Durall leading police to Carolyn's body. However, Durall failed to develop a factual basis for this claim in state court, and so this Court may not hold an evidentiary hearing on the subject. *See* 28 U.S.C. § 2254(e)(2); *Baja v. Ducharme*, 187 F.3d 1075, 1078-79 (9th Cir. 1999).

Conclusion

None of Durall's claims of error afford a basis for Federal habeas corpus relief. Accordingly, this Court ADOPTS the Magistrate Judge's R & R and DENIES Durall's petition for a writ of habeas corpus.

The Clerk is directed to send copies of this order to all counsel of record.

Dated: May 29, 2007.

/s Marsha J. Pechman

Marsha J. Pechman
United States District Judge

APPENDIX C

THE SUPREME COURT OF WASHINGTON

In re the Personal Restraint
Petition of

ROBERT DURALL,

Petitioner.

No. 78212-1

RULING DENYING
REVIEW

FILED
SUPREME COURT
STATE OF WASHINGTON
2006 MAR 10 A 9:54
BY C.J. MERRITT
/S/
CLERK

Robert Durall was convicted in 2000 of first degree murder in the death of his wife, for which he received an exceptional sentence. Division One of the Court of Appeals affirmed the judgment and sentence on direct appeal, and this court denied review. Mr. Durall timely filed a personal restraint petition in the Court of Appeals, asserting numerous grounds for relief. Finding Mr. Durall's claims clearly meritless, the acting chief judge dismissed the petition. Mr. Durall now seeks this court's discretionary review. RAP 16.14(c); RAP 13.5.

Mr. Durall first argues that the State violated his attorney-client privilege by examining him about his use of a private investigator after his wife's disappearance. But this claim was decided against Mr. Durall on direct appeal. He therefore must demonstrate that the interests of justice require reconsideration of the issue. *In re Pers. Restraint of*

Lord, 123 Wn.2d 296, 303, 868 P.2d 835 (1994). Mr. Durall urges that the issue should be reexamined because on direct appeal the Court of Appeals mistakenly believed that he, rather than his attorney, had hired the investigator. He now presents an affidavit from one of his former attorneys stating that the attorney had hired the investigator. But even if that is the case, the acting chief judge correctly observed that the attorney-client privilege is not of constitutional dimension. *See State v. Pawlyk*, 115 Wn.2d 457, 469, 800 P.2d 338 (1990); *United States v. Mett*, 178 F.3d 1058, 1066 (9th Cir. 1999). Mr. Durall therefore waived the issue by not objecting at trial. *State v. Davis*, 141 Wn.2d 798, 850, 10 P.3d 977 (2000). And even if the attorney-client privilege had constitutional magnitude, Mr. Durall fails to show, in light of the voluminous evidentiary record, that he was actually and substantially prejudiced by the claimed error. *See Lord*, 123 Wn.2d at 303. Mr. Durall therefore does not demonstrate that the interests of justice require reconsideration of this case.

Mr. Durall next argues that his original counsel, John Henry Browne, was ineffective in failing to secure a written plea offer before Mr. Durall agreed to disclose to authorities the location of his wife's body. But Mr. Durall does not show that the State had even orally offered a plea bargain in exchange for his cooperation. As the acting chief judge noted, the letter drafted to memorialize the actual agreement on the recovery of the body made no mention of a plea agreement. Mr. Durall did obtain a considerable concession from the State in form of an agreement not to introduce at trial any evidence of Mr. Durall's involvement in the recovery. Moreover, the State

ultimately offered Mr. Durall a plea bargain recommending the minimum 20-year sentence, 340 months less than the sentence he ultimately received. Mr. Durall asserts that Mr. Browne discussed disclosing the location of his wife's body in exchange for a "few years." But Mr. Durall does not demonstrate with affidavits either from Mr. Browne or from anyone else involved in the disclosure agreement that Mr. Browne said any such thing. In the absence of such affidavits, Mr. Durall fails to make a sufficient factual showing that Mr. Browne's representation was constitutionally deficient. *See In re Pers. Restraint of Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992). Nor does he demonstrate that the acting chief judge erred in finding no prejudice in light of all the evidence.

Continuing with the disclosure agreement, Mr. Durall asserts that the agreement was later altered, without his knowledge, to remove the requirement that the State not publicly disclose his cooperation. But he provides no affidavits fully explaining the circumstances of the alteration. Nor does he demonstrate that he was prejudiced by any pretrial publicity, that he would not have agreed to cooperate had he known that his cooperation might be made public, or that his lack of cooperation likely would have changed the outcome of the trial.

Mr. Durall next argues that attorney Browne improperly withdrew from his case. But as the acting chief judge noted, no trial date had been set when Mr. Browne withdrew. Thus, there was no violation of the rule that an attorney must secure written court approval to withdraw after the trial date has been set. *See CrR 3.1(e)*. Mr. Durall suggests that, given the

date of Mr. Browne's withdrawal, if no trial had been set by then his ultimate trial date necessarily violated the speedy trial rules of CrR 3.3. But the time for trial may be extended for a variety of reasons. Mr. Durall fails to show that his trial was untimely, and he fails to demonstrate prejudice in any event.

Mr. Durall next contends that a declaration that his then-attorney, Michelle Shaw, filed in connection with a request for public funds to investigate a possible mental defense revealed matters in violation of the attorney-client privilege. But Mr. Durall fails to show that the declaration was ever filed in court, and again, he fails to show how he was prejudiced.

Mr. Durall argues that hearsay statements were admitted at trial in violation of his right of confrontation. He refers specifically to statements his wife had made to co-workers and relatives about her plan to discuss divorce with Mr. Durall. But Mr. Durall's reliance on *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), is misplaced. That decision applies only to "testimonial" hearsay statements. Mr. Durall fails to show the statements his wife made to co-workers and relatives were "testimonial" under any reasonable reading of *Crawford*.

Mr. Durall next challenges the search of his work computer files by co-workers, the results of which were admitted at trial. But he does not demonstrate that he had a reasonable expectation of privacy in the files in light of his employer's policies and practices. Nor does he show that his co-workers, though public employees, were working on behalf of law enforcement.

Mr. Durall contends, next, that his double jeopardy rights were violated because the jury had reached a verdict before one of the jurors was excused, making the ultimate verdict a second "conviction" for the same crime. But as the acting chief judge noted, a jury's action does not become a verdict until it is finally rendered in open court and received by the trial judge. *State v. Robinson*, 84 Wn.2d 42, 46, 523 P.2d 1192 (1974). Although the first result may have been delivered to the trial judge in a sealed envelope before the juror was excused, that result was never rendered in open court and filed. Thus, the first result did not constitute a final verdict precluding the jury from continuing deliberations with a substitute juror. *State v. Wirth*, 121 Wn.App. 8, 13-14, 85 P.3d 922, *review denied*, 152 Wn.2d 1018 (2004).

Finally, Mr. Durall seeks to challenge his exceptional sentence under *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). But his judgment and sentence become final in May 2004, before the decision in *Blakely* was issued. *Blakely* therefore does not apply to Mr. Durall's case. *State v. Evans*, 154 Wn.2d 438, 114 P.3d 627, *cert. denied sub nom. Evans v. Washington*, __U.S.__, 126 S. Ct. 560, 163 L. Ed. 2d 472 (2005). Mr. Durall rightly notes that an unconstitutional sentence may be corrected at any time, but when his judgment became final his sentence was lawful. *Blakely* did not retroactively make the sentence unlawful.

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In sum, the acting chief judge committed no obvious or probable error in dismissing Mr. Durall's personal restraint petition. The motion for discretionary relief is therefore denied.

Geoffrey Crooks
COMMISSIONER

March 10, 2006